IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5325

BEN EARL BROWDER,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS,

Respondent.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AS AMICUS CURIAE

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May It Please the Court:

The American Civil Liberties Union, Illinois Division, respectfully submits this brief *amicus curiae*. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 42.

ISSUE ADDRESSED BY AMICUS

Whether *Stone v. Powell*, 428 U.S. 465 (1976) and 28 U.S.C. § 2243 require federal habeas corpus courts to hear and determine the merits of a state prisoner's Fourth Amendment claim which has never been considered on the merits in the state courts due to an inadvertent failure to present the claim at trial.

INTEREST OF THE AMICUS

The American Civil Liberties Union, Illinois Division, is a non-partisan organization, of approximately 9,000 members, from the State of Illinois. The Union is dedicated solely to the protection of the Bill of Rights. Federal habeas corpus is a critical vehicle for the protection and vindication of these fundamental liberties. The issues in the present case concern the Fourth Amendment right of citizens to be free from unreasonable searches and seizures and the scope of relief on federal habeas corpus review. This brief is intended to assist in the resolution of those issues.

STATEMENT OF THE CASE

The Illinois courts refused to hear Ben Earl Browder's unlawful arrest claim. But the District Court below held, first on the trial record and then after hearing the testimony of the arresting officers, that Browder had been arrested without probable cause, that the "fruits" of this unlawful arrest were tainted, and that the admission of the tainted evidence at Browder's trial was constitutional error. Browder along with three other Black youths had been arrested without warrants for purposes of investigation and viewing in a police line-up. This warrantless "investigatory arrest," the Court found, contravened the Fourth Amendment.

The District Court held that Browder's Fourth Amendment claim was cognizable on federal habeas corpus. At his state trial, Browder's court-appointed counsel failed to raise this claim. On direct appeal, Browder presented the claim, but the Illinois appellate court refused to consider it on the ground that Browder's lawyer's failure to raise it waived the claim. The Illinois courts then refused to consider petitioner's unlawful arrest claim in post conviction proceedings, holding that the Illinois appellate court had "considered" the claim on direct appeal and that *res judicata* barred collateral review. The District Court found that there was no tactical reason for Browder's trial counsel's failure of advocacy and that under *Fay v. Noia*, 372 U.S. 391 (1963), this inadvertent procedural default would not bar plenary consideration of his claim.

The Seventh Circuit reversed in an unpublished opinion. The Court of Appeals did not set aside as clearly erroneous any factual findings of the District Court, but disagreed with the lower court's conclusion that

Browder's warrantless arrest was without probable cause.

Browder's certiorari petition succinctly demonstrates that the Seventh Circuit's decision is a marked departure from this Court's Fourth Amendment decisions. Browder and three other Black teenagers were arrested at Browder's home without a warrant "to see which one would be identified" at a police line-up. Such warrantless invasions of the home for investigatory detention have been soundly and repeatedly condemned by this Court. *See Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1967). Amicus is fully in accord with petitioner's view of the Constitution and urges that the judgment of the Seventh Circuit be reversed.

Amicus addresses the following argument solely to the question of whether "federal relief to vindicate [Browder's] unlawful arrest claim would be precluded by *Stone v. Powell.*"[1] (Cert. Pet. at 2) Amicus submits that federal courts have the power and the duty to hear and determine Fourth Amendment claims, such as Browder's, which have never been considered on the merits in state courts.

[1] Two courts of appeal have considered this issue after this Court's decision in *Stone v. Powell* and reached different conclusions. The Second Circuit has held that claims such as Browder's are cognizable upon an application for federal habeas relief, *Gates v. Henderson*, 45 U.S.L.W. 2375 (2d Cir. 1977), and the Fifth Circuit has held that *Stone* forecloses federal collateral review of such Fourth Amendment claims, *O'Berry v. Wainwright*, 546 F.2d 1204 (5th Cir. 1977).

ARGUMENT

I.

Stone v. Powell Requires Federal Courts to Hear and Determine Browder's Fourth Amendment Claim on the Merits.

Stone v. Powell, 428 U.S. 465 (1976) holds that "a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of the claim at trial and on direct review." 428 U.S. at 495. In *Stone* the petitioners had raised and fully litigated and relitigated their Fourth Amendment claims on the merits throughout the state courts. In the instant case, Ben Earl Browder, through the inadvertence of his court-appointed trial attorney, was barred from litigating the merits of his unlawful arrest claim despite his repeated attempts to do so. The Court's analysis in *Stone* requires that Browder's constitutional claim be heard and determined by the federal courts.

Stone v. Powell reiterated that habeas corpus is a statutory remedy. 428 U.S. at 494-95, n. 37. This Court has long recognized that Congress establishes and defines the circumstances under which habeas relief will issue. *E.g., Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex Parte Dorr*, 44 U.S. (3 How.) 103 (1845). Since 1867 Congress has provided that federal courts must hear and determine the federal constitutional claims of citizens in custody pursuant to state court judgments. Act of February 5, 1867, 14 Stat. 385. The United States Code now provides that federal courts must "summarily hear and determine the facts" of such claims "and dispose of the matter as law and justice

require." 28 U.S.C. § 2243. This statutory scheme codifies the signal importance of the writ of habeas corpus to a democratic society.

Stone considered the application of the Fourth Amendment remedy of exclusion of evidence in the context of the clear congressional command that claims of unconstitutional confinement of state prisoners must be heard. *Stone* noted that Fourth Amendment claims frequently do not relate to the guilt or innocence of the accused and that application of the exclusionary remedy foreclosed the consideration of typically probative evidence. 428 U.S. at 490. Congress, however, has never limited the protections of the Great Writ only to those whose pleas of unconstitutional confinement related to the integrity of the fact-finding process. *Stone* did not, and could not, so rule. *Chessman v. Teets*, 354 U.S. 156, 165 (1957) (Opinion of Harlan, J.) *See Brewer v. Williams*, 45 U.S.L.W. 4287 (U.S., March 23, 1977).

Rather, *Stone* was concerned with the societal costs of federal relitigation of Fourth Amendment claims after full consideration had been afforded by the state judiciary. Accommodating the jurisdictional imperative of 28 U.S.C. § 2241 with these costs, *Stone* concluded that the exclusionary remedy should not be applied to such claims on federal habeas corpus when those claims have been fully and fairly litigated on the merits before the state courts.

Stone was predicated on principles of equitable restraint, not on the view that federal habeas courts have no jurisdiction to hear Fourth Amendment claims. 428 U.S. at 494-95. Citing Mr. Justice Powell's concurrence in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250-75 (1973), *Stone* identified the suspension of finality in criminal trials and the exacerbation of friction between federal and state systems of justice as the primary costs occasioned by the relitigation of constitutional claims on federal collateral review.[2] With respect to claims that have been heard and determined on the merits at all levels of state judicial process, these systemic costs are not insubstantial.

Measured against those costs, *Stone* found only limited benefit to federal habeas relitigation of Fourth Amendment claims that had been fully aired in state courts. The primary purpose of the Fourth Amendment remedy of exclusion is deterrence of official misconduct in derogation of the constitutional right. While reaffirming the continued vitality of the exclusionary rule, *Stone* concluded that this purpose is best effectuated by application of the remedy at state trial and appellate proceedings. 428 U.S. at 439. The possibility of federal reversal of claims previously rejected by the state courts would not significantly enhance the disincentive already present from the risk of state exclusion. Accordingly, *Stone* held that the costs of relitigation of Fourth Amendment exclusionary remedy claims, after rejection of those claims on their merits by all levels of the state judicial process, exceeded the benefits to be derived from such reconsideration.

Consistent with the congressional mandate that constitutional claims be heard, *Stone's* analysis compels the conclusion that Ben Earl Browder's unlawful arrest claim be given plenary federal consideration. Here, the

[2] *Stone* identified as an additional cost of relitigation intrusion upon "the most effective utilization of limited judicial resources." 428 U.S. at 491, n. 31. But federal habeas consideration of the constitutional claims of state prisoners necessarily involves some strain on "limited judicial resources" by requiring consideration of identical claims by both state and federal judicial systems. In the instant case, because the state court system never considered the merits of the claim presently before the federal court, any strain upon judicial resources is minimal at most.

benefits of a first-time determination of Browder's claim override the perceived systemic costs. Such first-time litigation merely incurs the incidental costs that are inherent in any system of federal collateral review of state convictions and is imperative lest Browder's Fourth Amendment right be unredressed.

Concerns of finality of criminal judgments, for example, are not compelling where, as here, such claims have never been presented or decided on their merits. Implicit in the very concept of collateral review is the suspension of the finality of a judgment. For this reason this Court has held that "conventional notions of finality of litigation" have no place in habeas corpus proceedings, *Sanders v. United States*, 373 U.S. 1, 8 (1963), and Congress has expressly limited the application of *res judicata* in such cases. 28 U.S.C. §§ 2244, 2254. H.R. Rep. No. 1892, 89th Cong., 2d Sess. 7-9 (1966).

Federal habeas jurisdiction represents a mandate by Congress to the federal courts to test the constitutional legality of state-imposed deprivations of liberty. After claims of unconstitutional deprivation have been presented, passed upon, and reviewed on the merits, at some point society's interest in terminating all collateral attacks and insuring certainty of punishment and rehabilitation may require preclusion of further habeas consideration as a matter of equitable restraint. *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L. Rev. 441 (1963). *Stone* suggests that, in the context of Fourth Amendment claims, this point is reached only after these claims have been fully considered at least once on their merits. But, to completely foreclose any consideration of Browder's constitutional claim in favor of putting an end to litigation exalts finality over the congressional purposes of habeas.

Similarly, the concerns of federalism found persuasive in *Stone* do not apply here. *Stone* was concerned with the "humiliating" reconsideration by federal district courts of a state court ruling on the merits of a constitutional claim. *Schneckloth v. Bustamonte*, 412 U.S. 250, 264 (1973) (Powell, J., concurring). The instant case simply does not present such a situation. Browder's federal constitutional deprivation has never, at any level, been considered or addressed by the courts of Illinois. Indeed, at every opportunity the Illinois courts refused to take such action. Thus, there is no "humiliating" reexamination of a considered state court ruling on the merits in this case.

The only relevant federalism concern here is that the availability of federal collateral relief not encourage intentional, strategic bypass of state courts as a forum for constitutional adjudication. This Court's decision in *Fay v. Noia*, 372 U.S. 391 (1963), however, satisfies this concern by providing that federal courts will not, as a matter of equitable discretion, consider federal claims that were intentionally or tactically bypassed in the state courts. Inadvertent procedural defaults, such as that of Browder's court-appointed counsel, are not likely to be deterred by penalizing the convicted defendant. The refusal of federal courts to consider grave constitutional deprivations due to such defaults would in no way further adherence to established rules of state procedure. *See* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1350-52 (1961).

Measured against these costs—which are minimal and clearly within the contemplation of Congress—the benefits accruing from the Fourth Amendment remedy in cases such as Browder's predominate. In this case, federal application of the exclusionary rule is necessary

to vindicate Browder's constitutional rights. In *Stone*, the constitutional claims were vindicated by being presented and fully considered at all levels of the state proceeding. To deny Browder access to the federal habeas forum is to leave the injury to his Fourth Amendment right without a remedy.[3]

Since the deterrence that justifies the exclusionary rule is systemic, not individual, the deterrence benefits here are significantly greater than in *Stone*. As set forth by Professor Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi. L. Rev. 665, 709-11 (1970):

> "The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule . . . . The exclusionary rule is aimed at affecting the wider audience of law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them.
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> * * *
>
> As a visible expression of social disapproval for the violation of these guarantees, the exclusionary rule makes the guarantees of the fourth amendment credible. Its example teaches the importance attached to observing them."

[3] The possibility of providing Browder with an alternative remedy under the Sixth Amendment may be more apparent than real. Sixth Amendment claims do not focus on the merits of the independent Fourth Amendment violation waived by counsel at trial but rather focus on the overall competency of counsel's representation. The standards of constitutional scrutiny and the constitutional concerns at issue are entirely different. *Compare Beck v. Ohio*, 379 U.S. 89 (1964) *with United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir.), *cert. denied, sub nom.* 423 U.S. 876 (1975). Thus, an entire class of Fourth Amendment claims may never be vindicated in the Sixth Amendment context—a result wholly at odds with the intent of Congress. *See Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1040, 1112 (1970).

Thus the deterrence of Fourth Amendment violations depends not so much on the application of sanctions as on the simple certainty that the constitutionality of the law enforcement official's actions will be scrutinized at least once by a court of law.

Permitting federal determination of Fourth Amendment claims inadvertently not presented to the state courts is thus the only accommodation of the purposes of the exclusionary rule and the policies of *Stone*. It insures that all not-intentionally waived Fourth Amendment claims will be resolved on their merits by a court of law; but, consonant with the concern that such claims not be indefinitely relitigable, these claims will still only be heard and determined on the merits at least once. In terms of the *Stone* cost-benefit analysis, so long as the opportunity for constitutional vindication is limited to one level, the fact that the forum is federal rather than state is insignificant.

We submit therefore that Ben Earl Browder has been "denied an opportunity for a full and fair litigation" of his unlawful arrest claim and that federal habeas courts must hear and redress this violation of his Fourth Amendment rights.

II.

Congress Has Mandated That Federal Habeas Courts Must Hear And Determine Browder's Fourth Amendment Claim On Its Merits.

Stone v. Powell must be read to require first-time consideration of Browder's Fourth Amendment claim on the merits in federal habeas courts. This Court must insure that the habeas corpus jurisdiction conferred on the federal judiciary by Congress be respected. The congressional command that Browder's claim must be

heard flows not from his assertion that he is "in custody in violation of the Constitution," *Stone v. Powell*, 428 U.S. at 502 (Brennan, J., dissenting), but from the fact that his unlawful arrest claim has never been "heard and determined" on the merits. 28 U.S.C. § 2243. Depriving Browder, and all others similarly situated, of any opportunity to have their claims determined by at least one court of law would defeat the clear intent of Congress and abrogate the statutory protections.

Congress has entrusted the federal courts with the power and duty to be the final arbiter of the constitutional legality of state-imposed deprivations of liberty. *Brown v. Allen*, 344 U.S. 443, 500 (1953). By statute, the federal courts are required to "entertain an application for" and may grant writs of habeas corpus on "behalf of a person in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a). The court entertaining the application for relief must "summarily hear and determine the facts,' and "dispose of the matter as law and justice require." 28 U.S.C. § 2243. "Simply because [unconstitutional detention] is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). If Congress has gone to such lengths to permit the relitigation of claims on the merits two or more times, the policy of Congress is *a fortiori* plainly to insure at least one full and fair litigation of constitutional claims.

This Court's decisions in *Townsend v. Sain*, 372 U.S. 293 (1963), and *Fay v. Noia*, 372 U.S. 391 (1963), confirm the controlling congressional direction that Browder's Fourth Amendment claim must be heard and determined on the merits. *Townsend* construed Section

2243's command that facts must be heard and determined. 28 U.S.C. § 2243. *Townsend* held that federal district courts must conduct evidentiary hearings and resolve the constitutional claims of state prisoners in all cases in which the habeas applicant did not receive a full and fair evidentiary hearing in a state court. 372 U.S. at 312-13. Thus federal courts must "hear and determine" a constitutional claim if "*for any reason not attributable to the inexcusable neglect of the petitioner* . . . evidence crucial to the adequate consideration of the constitutional claim was not developed" at a state court hearing. 372 U.S. at 317 (emphasis supplied). Browder's claim falls directly into this category and therefore must be considered and resolved on its merits.

Fay v. Noia held that state procedural defaults, like the inadvertent default of Browder's attorney here, do not deprive the federal courts of jurisdiction to grant habeas corpus relief to citizens in custody pursuant to state court judgments. *Fay* squarely rejected the notion that such defaults are independent and adequate state grounds that bar plenary resolution of federal constitutional claims. This result, the Court held, was compelled by Congress' decision to confer federal jurisdiction to hear such challenges and by the fundamental importance of habeas corpus to challenge violations of constitutional rights. 372 U.S. at 426-35. *Accord Lefkowitz v. Newsome*, 420 U.S. 283, 292 (1975); *Humphrey v. Cady*, 405 U.S. 504 (1972).

Fay did not hold, however, that all federal constitutional claims are cognizable in federal habeas courts. Thus, as a matter of equitable restraint federal courts will not entertain the plea of a defendant who has deliberately abused a state process, 372 U.S. at 438, or has slept on a constitutional right that can be cured,

Francis v. Henderson, 425 U.S. 536 (1976). Such restraint will not justify a refusal to consider Browder's claim. Browder did not waive his federal right to relief for tactical advantage nor is his illegal arrest a constitutional violation that is capable of cure within the trial process.

Congress ratified *Townsend* and *Fay* when it revised the habeas corpus statutes in 1966. Responding to those decisions, Congress rejected attempts to "take away from the federal courts all jurisdiction over habeas corpus to review state court action." H.R. Report No. 1892, 89th Cong. 2d Sess. 4-7 (1966). No action was taken to exclude from federal jurisdiction those claims that would be barred by the adequate state ground doctrine on direct review. Rather, Congress provided only for the qualified application of *res judicata* to claims that had once been presented to a federal court and spelled out those circumstances in which a state court's findings of fact after a hearing on the merits will be presumed correct. Act of November 22, 1966, Pub. L. No. 89-711, 80 Stat. 1104 *amending* 28 U.S.C. §§ 2244, 2254. Thus, Congress adopted *Townsend* and *Fay*'s well-reasoned construction of the habeas statutes. *See Georgia v. United States*, 411 U.S. 526, 533 (1973); *Shapiro v. United States*, 335 U.S. 1 (1948).

Stone v. Powell accordingly must be read to require federal habeas consideration of the merits of Browder's Fourth Amendment claim. *Stone* holds that state prisoners may not raise Fourth Amendment claims "absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review." 428 U.S. at 494-95. It is difficult to conceive of a clearer instance of a habeas petitioner being "denied an opportunity" to present a Fourth Amendment claim to the state courts than the

instant case in which counsel's inadvertent failure to raise the claim at trial, coupled with the restrictive Illinois "waiver/res judicata" rule, totally foreclosed any consideration whatsoever. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

More importantly, to bar the federal courthouse door to Browder would insure that no Fourth Amendment claim would ever be heard on federal habeas. If Browder has not been denied an "opportunity for a full and fair" state-court litigation of his claim, then such an opportunity would only be denied when a state court intentionally refused to *ever* consider Fourth Amendment claims, even when those claims have been properly preserved. This abuse of state judicial power presents a Fourteenth Amendment deprivation of due process of law wholly independent of the Fourth Amendment claim. In such a case, there is no cause to reach the Fourth Amendment issue. *United States ex rel. Petillo v. New Jersey*, 400 F.Supp. 1152, 1188 (D.N.J. 1975), *as supplemented*, 418 F.Supp. 686 (D.N.J. 1976) (habeas petitioners denied due process of law when state court refused to hear Fourth Amendment claims). Thus Fourth Amendment violations would no longer be cognizable on federal habeas. Such a result diametrically conflicts with the federal courts' responsibility under their habeas jurisdiction to "hear and determine" federal constitutional claims, and cannot be justified by any view of equitable restraint.

We submit therefore that to ignore the teachings of established decisional law and hold that Browder has forfeited his right to plenary federal consideration of his Fourth Amendment claim "would be in disregard of what Congress has expressly required." *Brown v. Allen*, 344 U.S. 443, 509-10 (1953) (Opinion of Frankfurter, J.).

CONCLUSION

For the foregoing reasons, this Court should consider the merits of Ben Earl Browder's Fourth Amendment claim as mandated by Congress. Amicus joins petitioner in urging that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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